IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-1002

VICTOR A. LAHMANN,

Petitioner,

vs.

GLEN HAUBROCK, BUILDING COMMISSIONER
and
BOARD OF COUNTY COMMISSIONERS OF
HAMILTON COUNTY, OHIO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Ohio

BRIEF FOR RESPONDENTS GLEN HAUBROCK, BUILDING COMMISSIONER AND BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

May a state court refuse to apply the doctrine of *res adjudicata* in litigation involving the same parties and the same premises as prior litigation, where the facts and said premises have been so altered that prior decisions are no longer applicable to present conditions?

Is Petitioner being denied the right to equal protection and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION AND ZONING RESOLUTION

The Fourteenth Amendment to the Constitution of the United States, Section 1.

The Zoning Resolution for the Unincorporated Territory of Hamilton County, Ohio, Sections 151 and 154 (Appendix A).

STATEMENT OF THE CASE

Petitioner's statement of the case is so intermingled with petitioner's own arguments and conclusions, that respondents wish to submit their own statement of the case, as follows:

Petitioner owns 4.81 acres of land and improvements thereon at 8100 Cheviot Road, Hamilton County, Ohio, subject to a non-conforming use certificate (Appendix B) that permits Petitioner to sell buses at retail, even though the property was zoned residence "B". This non-conforming use certificate was issued December 20, 1973 by order of the Court of Appeals for the First Appellate District of Ohio.

Shortly thereafter, Petitioner commenced making certain physical changes to the subject premises by constructing a new graveled parking lot on the southern portion of the land. Such newly constructed area required the changing of grade thereof by approximately six (6) feet in height, and the compaction of dirt and application of crushed rock and gravel of sufficient structural strength to support and accommodate up to forty (40) school buses. When the subject premises was acquired by Petitioner, the paved or graveled portions of the property totalled approximately 2,800 square feet. The newly constructed parking area (including the original parking area),

which is used for the display of from 18 to 30 saleable school buses, now covers approximately 30,000 square feet.

Thereafter, on March 21, 1974, the Building Commissioner of Hamilton County, Ohio, directed to Petitioner the following order with respect to the subject premises:

> "You are hereby ordered to cease the parking of vehicles on the newly constructed parking area immediately; and remove the gravel/rock surfacing of the newly constructed parking area and restore the original grass surface as is practical by May 1, 1974."

This order was appealed to the Board of Zoning Appeals which affirmed. It was then appealed to the Common Pleas Court of Hamilton County, Ohio, which found that the Commissioner had no right to order restoration of the grass surface. It was then appealed to the Court of Appeals of the First Appellate District of Ohio, which held also that the Commissioner had no authority to order removal of the gravel and the rock surfacing. The Court of Appeals affirmed that part of the order which prohibited Petitioner parking vehicles on the newly constructed parking areas. Thereafter, a timely motion to certify was filed with the Supreme Court of Ohio, which motion was dismissed.

ARGUMENT

THE DOCTRINE OF RES ADJUDICATA IS NOT APPLICABLE TO THE WITHIN APPEAL.

The addition by Petitioner of a 100′ x 300′ display area, which required grading, filling and sufficient surfacing to support a substantial number of school buses, is an enlargement and extension of Petitioner's *premises* subject to his existing non-conforming use, in violation of Section 154 of the Zoning Resolution of Hamilton County, Ohio. (Appendix A) Said Section 154 provides as follows:

> "Except as hereinafter provided in Article XVIII, no *existing* building or *premises* devoted to a use not permitted by this Resolution in the District in which such building or *premises* is located, except when required to do so by law or order, shall be enlarged, extended, reconstructed, or structurally altered, unless the use thereof is changed to a use permitted in the District in which such building or *premises* is located." (Emphasis added)

Further, Section 151 (Appendix A) of the said Zoning Resolution provides, in pertinent part:

> "The lawful use of any dwelling, building or structure and of any *land or premises* as *existing* and lawful at the time of enactment of this Resolution or amendment thereto, may be continued although such use does not conform with the provisions of the Resolution or amendment, • • •" (Emphasis added)

The word "existing" is a key word in the afore-quoted section. Petitioner has the unquestioned right to use his premises to the same *extent* as his predecessor in title used them prior to the enactment of the Zoning Resolution. This is true even though such usage be different in kind, but of the same or more restrictive zoning classification. This is substantially the position taken by the Court of Common Pleas of Hamilton County, Ohio in its first decision on this matter. Further, the

Court of Appeals of the First Appellate District of Ohio, in affirming the Court of Common Pleas did not anticipate the extensive change in the physical use of the subject premises accomplished by the Petitioner. That Court, at page 4 of its Decision in Cases No. C73321 and C73323 (Appendix C), made the following observation in interpreting Section 154 of the Zoning Resolution:

> "This section prohibits both 'building' and 'premises' being 'enlarged, extended, reconstructed, or structurally altered'. Lahmann seeks no such privileges; he seeks only the privilege of selling school buses and erecting a sign. • • •"

That Court's assumption is further evidenced in its conclusory paragraph, which states:

> "Lahmann's application being only for a permissive change of nonconforming use and not for an enlargement, extension, reconstruction or structural alteration, appellants' contention must be rejected and appellants' assignment or error must be held to be without merit."

Petitioner's extension of his non-conforming use by the construction of a 30,000 square foot display area, is violative of not only the *spirit* of the Zoning Resolution as it applies to non-conforming uses, but also violative of the order of the Court of Appeals in the issuance of the non-conforming use certificate.

The Court of Appeals of the First Appellate District of Ohio in its Decision in the second appeals case, No. C-75210 (Appendix D) clearly distinguished between the causes of action in the first and second appeals. The Court, in commenting on Section 154 of the Zoning Resolution, made the following observation:

> "This section prohibits the premises being enlarged or extended. Does Lahmann in the instant case seek such a privilege?

In the previous case, Lahmann sought no such privilege.

In the instant case, he does.

In the present case, we are faced with an extreme enlargement of the parking area that was in use at the time Lahmann purchased the property and at the time of the previous Court of Appeals' decision and mandate to issue a nonconforming certificate for the use of property for the sale at retail of buses. The present parking area is not within the limitations set down by the Court of Appeals in the previous case. Judge Black, in the present case, held that the use of the new construction for parking is a violation of the Zoning Resolution and that the enlargement can be prevented and enjoined and with this, this Court agrees."

For the aforesaid reasons, it is clear that neither the Court of Common Pleas nor the Court of Appeals of Hamilton County, Ohio are bound by the Doctrine of Res Adjudicata to follow the decisions set forth by the Court of Common Pleas and the Court of Appeals in the prior cases. The prior decisions were based upon a specific set of facts existing at that time. Petitioner's extensive alteration of his premises, has altered the fact situation to such a degree that the prior decisions can have no logical application to present conditions. In the case of *Whitehead* v. *General Telephone Co.*, (1969) 20 Ohio St. 2d 108, the Supreme Court of Ohio held that "a final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action related to the same subject matter." In the instant situation, both the cause of action and the facts involved in the second appeal are different from those in the prior appeal, even though the same subject matter and the same parties are involved.

Petitioner has cited several cases in support of his position involving the applicability of the Doctrine of Res Adjudicata,

however, all of the cases cited are based upon the proposition that the cause or causes of action and the facts in a subsequent case are virtually the same as in the prior litigated case. Those conditions are not present in the instant matter. Therefore, the cited cases are not applicable.

THE PETITIONER IS NOT BEING DENIED THE RIGHT TO EQUAL PROTECTION AND DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner has raised a constitutional question which is without merit. The right of a governmental unit to impose zoning restrictions has unquestionably been declared to be a proper exercise of police power, and in conformity with the due process safe-guards of the State and Federal Constitutions. Likewise, limitations placed upon uses existing at the time of the establishment of zoning (non-conforming uses) have also been generally deemed to be constitutionally acceptable. In the present case, the petitioner has not lost a valuable property right in the subject premises. He has been merely restricted in the use of said premises to such usage as existed at the time zoning became effective in Colerain Township, Hamilton County, Ohio, such usage being readily apparent to petitioner at the time of his purchase of said promises. Petitioner's non-conforming use certificate does not guarantee him the unlimited and unrestricted use of the subject premises for the retail sale of school buses. Said non-conforming use certificate merely permits petitioner to use said premises for the retail sale of school buses to the extent *existing* and lawful at the time of the enactment of the Zoning Resolution. The 30,000 square foot display area was not in existence at the time of enactment of the Zoning Resolution.

CONCLUSION

There is no substantial constitutional question involved herein. None of the considerations, set forth in Rule 19 of the Rules of this Court, governing review on certiorari, are present in this case. The decisions of the lower courts are clearly correct.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

ZONING RESOLUTION
for the
UNINCORPORATED TERRITORY
of
HAMILTON COUNTY, OHIO

Sec. 151 The lawful use of any dwelling, building or structure and of any land or premises as existing and lawful at the time of enactment of this Resolution or amendment thereto, may be continued although such use does not conform with the provisions of this Resolution or amendment. If no structural alterations are made, a non-conforming use of a building may be changed to another non-conforming use of the same or of a more restricted classification. Whenever a non-conforming use has been changed to a more restricted use or to a conforming use, such use shall not thereafter be changed to a less restricted use.

Sec. 154 Except as hereinafter provided in Article XVIII, no existing building or premises devoted to a use not permitted by this Resolution in the District in which such building or premises is located, except when required to do so by law or order, shall be enlarged, extended, reconstructed, or structurally altered, unless the use thereof is changed to a use permitted in the District in which such building or premises is located.

APPENDIX B

NON-CONFORMING USE CERTIFICATE STILL IN EFFECT

Important Document: Keep with Permanent Property Records.

NUMBER 1607 APRIL 18, 1973

COUNTY OF HAMILTON
DEPARTMENT OF BUILDING INSPECTOR
ZONING CERTIFICATE

PREVIOUS OWNER CARL R. BIBBEE AND ISABEL BIBBEE

This is to certify that the Building Inspector of Hamilton County, Ohio, on this 20th day of December 1973 issued a Zoning Certificate to VICTOR A. LAHMANN AND MARGARET LAHMANN for the USE OF RETAIL SALES OF BUSES (COURT OF APPEALS CASE NOS. C-7332, C-7332), located at 8100 CHEVIOT ROAD, COLERAIN Township, Hamilton County, Ohio.

Such use is a NON-CONFORMING use of the premises according to the Zoning Resolution for the Unincorporated Territory of Hamilton County, Ohio. Stated use is permitted within Article XV, Sec. 151, 152, 153, 154 and 155 of the Resolution, if such shall also conform in other respects to the Resolutions of Hamilton County and the laws of the State of Ohio.

This Certificate must be presented to the Building Inspector if changes in the use or structure are desired as within Article XV, Sec. 154 and/or Sec. 155.

/s/ GLEN O. HAUBROCK
Building Inspector,
Hamilton County, Ohio.

Date December 20 ,1973
PAID Dec. 20, 1973
Glenn O. Haubrock, Bldg. Comm.

APPENDIX C

DECISION OF COURT OF APPEALS IN PRIOR CASE

IN THE COURT OF APPEALS OF
HAMILTON COUNTY, OHIO

No. C-73321 and No. C-73323

In Re: Board of Zoning Appeals,
County of Hamilton,
Appeal of Victor A. Lehmann.

DECISION

(Rendered on November 19, 1973.)

WENDT, P. J., sitting by assignment.

This appeal is third in a series of appeals from the Hamilton County Building Commissioner's denial of an application for a zoning certificate permitting a change in the use of a parcel of land from that of the operation of a retail nursery store to use in the retail sale of school buses. The County Board of Zoning Appeals sustained the Commissioner's denial. On appeal, the Court of Common Pleas reversed the Board and ordered the Board to permit the premises to be used for the retail sale of buses.

In 1971 the appellee, Victor A. Lahmann, acquired nearly five acres of improved real estate in Hamilton County, intending to use such premises in the sale of school buses. The prior owner had used the premises for many years in part for his residence and in part in operating a retail nursery business in which he sold a few trees, shrubs, plants, and various nursery products. His retail business was neither intensive nor extensive. While the property is located within a "B" Residence district,

it is undisputed this retail nursery business was an authorized nonconforming use under the Zoning Resolution, it being a Retail "E" operation within the meaning of the Resolution.

On or about April 18, 1972, Lahmann made application to the Department of Building Inspector for a permit to use his property for the "Retail Sale of Buses" and "Erection of Sign on Building." As has been stated, this application was denied by both the Building Inspector or Commissioner and the County Board of Zoning Appeals. Said authorities were thereafter reversed by the Court of Common Pleas.

• • •

Had the Court of Common Pleas made such a finding, we might be inclined to concur with appellants, but such assignment of error is deduced from an erroneous major premise, as Judge Black of the Common Pleas Court succinctly demonstrated in his opinion. The zoning restriction relates to the type of use made of the land and buildings. Lahmann, if he wished to do so, could use his property for conducting retail nursery sales to the same extent and in the same manner as the prior owner was permitted. Although the prior owner did very little business, the zoning restrictions in no way limited the size or number of retail sales that could be made. Had he chosen to do so, the prior owner could have augmented his sales without thereby violating zoning limitations. Lahmann succeeded to the same rights, for Article XV, Section 151, of the Hamilton County Zoning Resolution provides:

> "§ 151. The lawful use of any dwelling, building or structure and of any land or premises as existing and lawful at the time of enactment of this Resolution or amendment thereto, may be continued although such does not conform with the provisions of this Resolution or amendment. If no structural alterations are made, a nonconforming use of a building may be changed to another nonconforming use of the same or of a more restricted classification. Whenever a nonconforming use has been changed to a more restricted use or to a conforming use, such use shall not thereafter be changed to a less restricted use."

Under his nonconforming authority the prior owner could have made retail sales of any other type of products or merchandise falling within the scope of Retail "E" sales. So could Lahmann, for it is conceded "that the operation of a nursery store and the retail sale of school buses are both Retail "E" operations within the meaning of the Zoning Resolution, and if either were a valid nonconforming use, it could be changed to the other, so long as no extension or expansion was involved."

• • •

Appellants contend Lahmann may blacktop part of the premises and this would be a structural alteration of the premises. First, Lahmann has not asked for permission to blacktop. Only if and when he does so would the question arise as to whether this would be a "structural alteration." Second, the question would be immediately answered by Section 31.45 of the Zoning Resolution, reading:

> "§ 31.45. Structural Alterations. Any change in the supporting members of a building, such as bearing walls or partitions, columns, beams or girders, or any increase in the area or cubical contents of the building."

Commenting on Section 154, Judge Black said:

> "But the plain and obvious intent of this section is that it governs enlargement and extension of both buildings and premises, and the reconstruction or alteration of buildings but *not* to enlargement or extension of use. In other words, while Section 151 permits a change from one nonconforming use to another nonconforming use within the same classification, Section 154 states that where there is any nonconforming use (whether the first or an additional one), the land cannot be added to nor can the building be enlarged, reconstructed or structurally altered without complying with Section 154."

Lahmann's application being only for a permissive change of nonconforming, use and not for an enlargement, extension, reconstructive or structural alteration, appellants' contention must be rejected and appellants' assignment of error held to be without merit.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, is affirmed.

STRAUSBAUGH and REILLY, JJ., concur.

WENDT, P. J., sitting by assignment in the First District Court of Appeals.

STRAUSBAUGH and REILLY, JJ., of the Tenth District Court of Appeals, sitting by assignment in the First District Court of Appeals.

WENDT, J., retired and assigned to active duty under authority of Section 6(C), Article IV, Constitution.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX D

IN THE COURT OF APPEALS FOR
HAMILTON COUNTY, OHIO

No. C-75210

IN RE APPEAL OF VICTOR A. LAHMANN,
Plaintiff-Appellant,

vs.

GLEN HAUBROCK,
BUILDING COMMISSIONER

and

BOARD OF COUNTY COMMISSIONERS
OF HAMILTON COUNTY, OHIO,
Defendant-Appellee.

DECISION

(Filed May 17, 1976)

LINDHORST AND DREIDAME
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For Intervenors

JOHN J. GREISINGER, J.; Sitting by Assignment.

This is an appeal from a judgment of the Court of Common Pleas of Hamilton County, Ohio, affirming the Order of the Board of Zoning Appeals in the above-entitled case.

The appellant's predecessor in the title owned the five acre tract of land in question, most of which was in grass and a small portion of which was devoted to the retail sale of nursery products. The prior owner used the premises for many years in part for his residence and in part in operating a retail nursery business in which he sold a few trees, shrubs, plants and various nursery products. His retail business was neither intensive nor extensive.

Subsequently, the tract was zoned within a "B" Residence District. It is undisputed that this retail nursery business was an authorized non-conforming use under the Zoning Resolution, it being a retail "E" operation within the meaning of the Zoning Resolution. This was observed by the prior ruling in the previous case by the Court of Appeals.

On or about April 18, 1972, the appellant Lahmann, who had purchased the property, made an application to the Building Commissioner for a permit to use the property for "Retail Sale of Buses" and "Erection of Sign on Building". The application was denied by both the Building Commissioner and the County Board of Zoning Appeals. Said authorities were thereafter reversed by the Common Pleas Court (Judge Black).

The Board of Zoning Appeals prosecuted an appeal to the Court of Appeals of the Hamilton County (Case No. C-73321 and C-73323). The Court of Appeals observed that Lahmann succeeded to the same rights as the prior owner and could

have augmented his sales but, it is to be noted, the Court of Appeals was silent on the question of whether the business could be extended over more of the five acres than was presently used for said retail sale purposes.

Thus arises the question that was presented to the Board of Zoning Appeals and the Common Pleas Court in the present case. Pursuant to the mandate of the Court of Appeals in the first case a Non-Conforming Certificate was issued to Lahmann for the "use of retail sales of buses".

About forty-five (45) days after the Court of Appeals' decision, Lahmann began the construction of a new gravel parking lot in the southerly portion of the land. The new construction increased the parking area to a size of more than ten times the size of the parking area which existed at the time Lahmann acquired the property.

In the construction of the new parking facility, considerable grading took place and the parking area was covered with stone and gravel. The new parking facility was large enough to accommodate many more buses than the parking area would have provided at the time of the original case.

The Building Commissioner and the Zoning Board denied the appellant's right to said newly constructed parking area. The Building Commissioner made the following order in respect of said real estate:

> "You are hereby ordered to cease parking of vehicles on the newly constructed parking area immediately; to remove the gravel/rock surfacing of the newly constructed parking area and to restore the original grass surface as is practical by May 1, 1974"

An appeal from this order was timely taken to the Board of Zoning Appeals, who affirmed the action of the Building Commissioner and denied the appeal of the appellant. A timely notice of the appeal from the ruling of the Zoning Board of Appeals was filed in the Common Pleas Court which rendered an Opinion affirming the action of the Building Commissioner except as to the language restoring the original grass surface.

The appeal was prosecuted to this Court. Judge Black, in the case now before the Court of Appeals in his Opinion stated: "The question now is how far the owner of a non-conforming use may go in extending or intensifying that use." Section 151 of the Hamilton County Zoning Resolution provides in part as follows:

> "The lawful use of any • • • land or premises as existing and lawful at the time of the enactment of this Resolution • • • may be continued although such does not conform with the provisions of the Resolution • • • Whenever a non-conforming use has been changed to a more restricted use or to a conforming use, such shall not thereafter be changed to a less restricted use."

There seems to be no doubt that the appellant could continue to operate the nonconforming use for retail sales of buses on the part of the land that was used by his predecessor for retail sales before the adoption of the Zoning ordinance.

The question remains whether that could be extended.

Section 154

> "Except as hereinafter provided • • • no premises devoted to a use not permitted by this Resolution in the District in which such • • • premises is located shall be enlarged, extended and • • • unless the use thereof is changed to a use permitted in the District in which such • • • premises is located."

This section prohibits the premises being enlarged or extended. Does Lahmann in the instant case seek such a privilege?

In the previous case, Lahmann sought no such privilege.

In the insant case, he does.

In the present case, we are faced with an extreme enlargement or extension of the parking area that was in use at the time Lahmann purchased the property and at the time of the previous Court of Appeals' decision and mandate to issue a nonconforming certificate for the use of property for the

sale at retail of buses. The present parking area is not within the limitations set down by the Court of Appeals in the previous case. Judge Black, in the present case, held that the use of the new construction for parking is a violation of the Zoning Resolution and that the enlargement can be prevented and enjoined and with this, this Court agrees.

58 O. Jur. 2nd, Sec. 63:

However, the gravel and rock surfacing is not a structure as defined in Section 31.45 of the Zoning Resolution and, therefore, the Court had no authority to order its removal and, with the Court's ruling in this respect, we disagree. We do agree, however, with the ruling of the Court that the Building Commissioner and the Board had no authority to order the grass to be replanted in the parking area. Therefore, the ruling of Judge Black in the second case is affirmed as to part and overruled as to part, as indicated.

There are several assignments of error.

Each assignment of error was reviewed by the Court, and, upon review, the following disposition thereof is made:

> *Assignment of error No. 1*: The Court of Common Pleas erred in affirming, even in part, the Resolution of the Board of Zoning Appeals dated July 3, 1974.

As to what has already been said in the foregoing Opinion of this Court, the Court finding that the Common Pleas Court did not err except as to ordering the removal of the gravel and rock and the replanting of the grass.

> *Assignment of Error No. 2*: The Court of Common Pleas erred in determining that the Building Commissioner could order appellant "to cease the parking of vehicles on the newly constructed parking area immediately", where this was on private property and was being used only for a use authorized by a Zoning Certificate.

The Court of Common Pleas did not err in determining that the Building Commissioner could order the appellant

to cease parking vehicles on the newly constructed parking area immediately, as has been already determined in the foregoing Opinion of this Court.

> *Assignment of Error No. 3*: The Court of Common Pleas erred in determining that the Building Commissioner could order appellant to "remove the gravel/rock surface of this newly constructed parking area", where this was on private property and was being used only for use authorized by the Zoning Certificate.

As to the removal of the gravel/rock surfacing, the Court has already ruled that the Common Pleas Court erred but otherwise, as to this Assignment of Error, the Court finds that the Common Pleas Court did not err, as set forth in the Opinion of the Court.

> *Assignment of Error No. 4*: The Court of Common Pleas erred in determining that the placing of loose stone and gravel upon the surface of appellant's land was a "structure" within the meaning of Section 31.44 of the Zoning Resolution governing the zoning of the area in question, and refusing to follow the decision of the same Court of Common Pleas in Case No. A-725570, and in ignoring completely and refusing to follow the clear pronouncement of the Court of Appeals in a previous case involving the same parties, which bore the numbers C-73321 and C-73323 in the Court of Appeals of Hamilton County, Ohio, which decision was rendered by a visiting Court of Appeals.

The ruling on this assignment of error is the same as contained in Assignment of Error #3.

Assignment of Error No. 5: This is covered in the ruling of Assignment of Error No. 4.

Assignment of Error No. 6: The Court finds no error in Assignment of Error No. 6 in that there was no structure or building involved and, therefore, no permit was required.

Assignment of Error No. 7: The Court finds that under the circumstances and the ruling of the Court in this case that there was no prejudice herein involved, as to Assignment of Error No. 7.

Assignment of Error No. 8: The Court finds no error in the ruling of the Court below on Assignment of Error No. 8, as set forth in the foregoing Opinion of this Court.

Assignment of Error No. 9: This Court finds that there was no error in that the Court did not attempt to legislate as claimed.

Assignment of Error No. 10: The Court did not err in respect to Assignment of Error No. 10, as set forth in the foregoing Opinion.

Assignment of Error No. 11: The Court of Common Pleas did not err in this respect as set forth and previously observed that no building or structure was involved and no building permit required.

Assignment of Error No. 12: The Court below did not err in this respect. No such approval was required.

Assignment of Error No. 13: The Court did not err in respect to the error claimed in Assignment of Error No. 13. 58 O.Jur.2d Section 29:

> "Zoning Regulations are adopted and enforced pursuant to police power under which government may enact in the furtherance of public safety, health, morals, or general welfare."

58 O.Jur.2d, Section 33, page 506:

> "The constitutionality of comprehensive zoning was established by the Supreme Court of the United States in Euclid v. Ambler Realty Company, a case which originated in Ohio." *Euclid* v. *Ambler*, 272 U.S. 365.

Assignment of Error No. 14: The Court did not err in re-

gard to Assignment of Error No. 14. The same reasons as given under Assignment of Error No. 13 apply.

Assignment of Error No. 15: The Court finds no error in regard to Assignment of Error No. 15; the same authorities as cited in Assignment of Error Nos. 13 and 14 are applicable.

Assignment of Error No. 16: The Court did not err in Assignment of Error No. 16. This Court finds that the action of the Common Pleas Court in ajrming the Board of Zoning Appeals is supported by evidence and is not contrary to the weight of the evidence.

58 O. Jur., Section 178, page 633:

> "In the absence of evidence that the decision was an abuse of discretion or an act in excess of the power of the board or was unreasonable after all the circumstances, the Board's decision will be upheld."

We find that the Board's decision should be upheld.

Assignment of Error No. 17: The Court finds no error in Assignment of Error No. 17 and that the action of the Common Pleas Court in affirming the ruling of the Board of Zoning Appeals is not contrary to law.

REILLY, J., AND DAHLING, J., CONCUR.

GREISINGER, P. J., RETIRED, AND ASSIGNED TO ACTIVE DUTY UNDER AUTHORITY OF SECTION 6(C), ARTICLE IV, CONSTITUTION.

REILLY J., OF THE TENTH APPELLATE DISTRICT, AND DAHLING, J., OF THE ELEVENTH APPELLATE DISTRICT, SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court will place of record its own entry in this case ten (10) days following the release of this Decision.